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IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

Marvin Rodriguez, Appellant

v.

The State of Texas, Appellee

Appeal from Tarrant County

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STATE PROSECUTING ATTORNEY'S BRIEF AS AMICUS CURIAE

* * * * *

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No. PD-1130-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Marvin Rodriguez, Appellant

v.

The State of Texas, Appellee

STATE PROSECUTING ATTORNEY'S BRIEF AS AMICUS CURIAE[1]

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State cannot prove murder without proving intent. A defendant should not be able to justify murder without admitting intent.

STATEMENT OF THE CASE

Appellant was convicted of murder. The court of appeals upheld the denial of an instruction on self-defense because it was "undisputed that appellant did not admit the culpable mental state for murder," and he "repeatedly insisted that the shooting was unintentional and an accident."[2] This Court granted review to, *inter alia*, consider "the continued vitality of *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989)[,]" which purports to allow self-defense in this circumstance.

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[1] This office received no fee for this filing.

[2] *Rodriguez v. State*, No. 02-17-00371-CR, 2019 WL 3491647, at *3 (Tex. App.—Fort Worth Aug. 1, 2019, pet. granted) (not designated for publication).

SUMMARY OF THE ARGUMENT

When the State fails to prove the culpable mental state for murder, it cannot obtain a murder conviction; the most it can get is conviction for a lesser-included offense. When a defendant denies that same culpable mental state, the result should be comparable; the best he should be able to do is justify a lesser offense. Because of one line of cases most recently approved of in *Ebikam v. State*,[3] that does not appear to be the case. Once examined, however, that line does not support ignoring what has otherwise been established law for decades: a defendant cannot justify an offense he denies happened. That line instead supports the idea—recently rediscovered—that an unintentional homicide can be justified under some circumstances.[4]

ARGUMENT

I. *Ebikam* was perhaps not as clarifying as intended.

In *Ebikam*, this Court addressed whether a defendant must admit the alleged manner and means of assault to obtain a self-defense instruction. It held he did not.[5] Along the way, the Court briefly summarized the law on confession and avoidance.[6]

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[3] 2020 WL 3067581 (Tex. Crim. App. June 10, 2020) (not designated for publication).

[4] *Alonzo v. State*, 353 S.W.3d 778, 783 (Tex. Crim. App. 2011).

[5] 2020 WL 3067581 at *4.

[6] *Id*. at *1-3.

It said:

> A flat denial of the conduct in question will foreclose an instruction on a justification defense. A defensive theory of that nature does not seek to justify the conduct in question, denying it instead. But an inconsistent or implicit concession of the conduct will meet the requirement. Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction.[7]

Unpublished though *Ebikam* was, it has become the focus of the argument over entitlement to justification defenses. And it raises the question presented in this case: what does a "flat denial" look like?

The above paragraph suggests one must present a defensive theory that accepts the commission of the offense. The "confession"—nothing formal is required—may be inartful, implicit, or even inconsistent, but it must embrace all the elements nonetheless. That makes sense. And it's fair.

But *Ebikam* also highlighted the relatively few cases from this Court, like *Martinez v. State*, that say a defendant's unequivocal denial of the culpable mental state is not disqualifying.[8] In context, then, what *Ebikam* could mean is that a defendant "flatly denies" an offense only when he denies both components of conduct, *i.e.*, the act and mental state. That is how appellant reads it; he equates "flat

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[7] *Id*. at *3.

[8] 775 S.W.2d 645, 647 (Tex. Crim. App. 1989).

denial" with "I wasn't there."[9] Is that all it takes for a jury to rationally consider self-defense—sufficient evidence of guilt and the prerogative to ignore a defendant's denial of one (but not all) of the elements?

Appellant understandably relies most heavily on *Martinez*.[10] However, the applicable part of *Martinez* is *dicta* because this Court ultimately held Martinez was not entitled to an instruction on self-defense.[11] Moreover, neither *Martinez*'s roots nor its branches suggest this Court has established justification of murder despite denial of intent. Viewed collectively, that line of cases instead supports what *Alonzo v. State* more recently held: justification applies directly to unintentional homicides.[12]

II. The *Martinez* line is not what this Court makes it out to be.

Following the citations in *Martinez* reveals it is built on ten cases.[13] Half are from before 1920. The other half are from 1963 to 1982. Only one case in this line, *Garcia*, applied the rule for which *Martinez* is known. Another, *Carden*, applied

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[9] App. Br. at 6.

[10] App. Br. at 7-8.

[11] *Martinez*, 775 S.W.2d at 647.

[12] 353 S.W.3d 778, 783 (Tex. Crim. App. 2011).

[13] *Wesley v. State*, 65 S.W. 904 (Tex. Crim. App. 1901); *Carr v. State*, 87 S.W. 346 (Tex. Crim. App. 1905); *Carden v. State*, 138 S.W. 396 (Tex. Crim. App. 1911); *Jackson v. State*, 147 S.W. 589 (Tex. Crim. App. 1912); *Merritt v. State*, 213 S.W. 941 (Tex. Crim. App. 1919); *Sullivan v. State*, 365 S.W.2d 810 (Tex. Crim. App. 1963); *Roberson v. State*, 479 S.W.2d 931 (Tex. Crim. App. 1972); *Garcia v. State*, 492 S.W.2d 592 (Tex. Crim. App. 1973); *Halliburton v. State*, 528 S.W.2d 216 (Tex. Crim. App. 1975) (orig. op.); *Sanders v. State*, 632 S.W.2d 346 (Tex. Crim. App. 1982).

something similar. But some cases militate against *Martinez*, and others are irrelevant or would be decided differently today. They fail to establish a rationale for *Martinez*'s dicta.

II.A. Only one of the early cases supports *Martinez*.

Wesley mixes murder, manslaughter, and accident.[14] Wesley shot a man in a struggle following allegations of "false dice."[15] He said the gun went off as he was trying to free it so he could shoot or hit the victim with it.[16] The charge instructed on both (then) degrees of murder, on manslaughter, and on accident but not self-defense.[17] This Court correctly saw self-defense as "the real issue his testimony was intended to and did raise."[18] That is, Wesley's explanation that he was trying to intentionally injure the victim with a gun in self-defense was plain, despite the claim the injury accidentally came early. There was no true denial.

Carr concerned an "assault to murder" involving the possibly accidental discharge of a firearm,[19] but the case was not about the sufficiency of an admission

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[14] 65 S.W. at 904.

[15] *Id*.

[16] *Id*. at 905.

[17] *Id*.

[18] *Id*.

[19] 87 S.W. at 346-47. This offense, Article 500 of the 1879 Penal Code, https://www.sll.texas.gov/assets/pdf/historical-statutes/1879/1879-4-penal-code-of-the-state-of-texas.pdf (p. 70), later re-codified as Article 1160 of the 1925 Penal Code, (continued...)

of intent. The relevant portion of the opinion dealt with a "confusing" charge that failed to require that the specific intent to kill "be attended by malice aforethought" but also required that the State to prove the discharge was not accidental.[20] The Court agreed that not requiring malice aforethought was a problem. By way of illustration, it pointed out that, "had the killing occurred, the issue of manslaughter would have been strongly suggested by the evidence; and appellant could have fired with the specific intent to kill, and, had the killing occurred, it might have been no greater offense than manslaughter."[21] That is, the evidence suggested an offense based on sudden passion rather than premeditation or malice aforethought.[22] And, based on how the charge was written, the Court also believed the trial court was trying to instruct on the defense of accident.[23] Nothing in the Court's reasoning leads to the conclusion that a defendant is entitled to a self-defense instruction on an intentional offense despite disclaiming that intent. Moreover, pointing out that an accident

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[19](...continued)
https://www.sll.texas.gov/assets/pdf/historical-statutes/1925/1925-3-penal-code-of-the-state-of-texas.pdf (p. 273), would be charged as attempted murder or aggravated assault today.

[20] *Id*. at 347.

[21] *Id*.

[22] The 1879 Penal Code defined manslaughter as "voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law."
https://www.sll.texas.gov/assets/pdf/historical-statutes/1879/1879-4-penal-code-of-the-state-of-texas.pdf (p. 80).

[23] *Carr*, 87 S.W. at 347.

defense existed apart from self-defense suggests there was no need to force self-defense to apply despite denial of the requisite intent; a defendant had an avenue of acquittal that better fitted his version of events.

Carden is a manslaughter case about a shooting in a saloon.[24] Carden testified that he "jerked his gun out" after the victim, who Carden "knew was a bad man, [who] would kill [him] in a minute," advanced and moved for his own gun.[25] The relevant testimony is not quoted, but this Court said Carden testified the gun went off accidentally.[26] The jury was charged on accident but this Court said "the jury should have been told in the charge, under the circumstances, that even though they found that the pistol was not accidentally fired, if [the] deceased, from his words, acts, and conduct at the time, created in the mind of appellant a reasonable expectation or fear of death or serious bodily injury, he would have the right to shoot."[27] Although *Carden* is not a case of justified murder despite denial of intent, it is a case of self-defense applying to what would later be called voluntary manslaughter despite claiming accidental discharge. The Court did not explain how a manslaughter offense that by definition is not justified can be subject to a self-defense instruction.

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[24] 138 S.W. at 397.

[25] *Id*.

[26] *Id*.

[27] *Id*.

Jackson is another manslaughter case.[28] Jackson shot at a perceived assailant at a party but killed an innocent person.[29] The trial court refused a self-defense instruction.[30] This Court reversed, holding that self-defense as to the intended target "unquestionably" applied to the victim.[31] The authorities upon that question were so clear it was "unnecessary to cite them."[32] Today, the outcome would not be so clear; the right to "transferred" self-defense under the modern penal code is qualified by Section 9.05, which makes justification unavailable for the reckless injury or death of an innocent third person.[33] Regardless, *Jackson* does not support self-defense to murder over a denial of any intent to kill anyone. Overall, it merely presaged what this Court held in *Alonzo*—a reckless homicide may not be so reckless when principles of justification are considered.

Not only was *Merritt* another manslaughter case, he was given a self-defense instruction notwithstanding the fact that he denied any involvement in or responsibility for the deceased's death.[34] It was the flattest of denials. Today, Merritt

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[28] 147 S.W. at 589.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 590.

[32] *Id*.

[33] TEX. PENAL CODE § 9.05.

[34] 213 S.W. at 942-43. The deceased's husband said Merritt tried to hit him with a pistol and (continued...)

would not be given the instruction even under appellant's view of *Ebikam*. Glaring distinctions notwithstanding, the gist of *Merritt* on this point was that a jury charge on self-defense to manslaughter should not "requir[e] the jury to believe that such discharge was accidental before appellant's right of self-defense existed."[35] As the Court explained,

> If appellant was placed in such position by the circumstances as gave him the legal right to defend against an unlawful attack on the part of Johnson, causing him to have a reasonable expectation or fear of death or serious bodily injury, his right of self-defense would inure regardless of whether the discharge of the pistol was accidental or otherwise.[36]

Again, this supports the application of self-defense as to unintentional homicide as per *Alonzo*, not what *Martinez* purportedly held.

II.B. Only one of the mid-century cases supports *Martinez*.

It is puzzling why *Sullivan* appears in this line, as it stands for the opposite proposition as *Martinez*. Sullivan complained that the instruction on self-defense to murder was limited to an act done without any intent to kill.[37] This Court rejected the complaint for one simple reason: the instruction "tracked the defendant's version of

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[34](...continued)
it went off, killing the man's wife. *Id*.

[35] *Id*. at 942.

[36] *Id*.

[37] 365 S.W.2d at 812.

the killing," highlighted by her repeated denials of any intent to kill.[38] Tailoring a self-defense instruction to the defense presented by the defendant is a good idea.

Roberson dealt with entitlement over denial, but not in any way relevant to *Martinez*'s *dicta*. The issue was entitlement based on party liability.[39] Roberson was convicted based solely on proof he was a principal with Langston, the man who cut the victim.[40] This Court held that, regardless of what Roberson claimed (or disclaimed), if Langston would have been justified in his actions, Roberson could not have been convicted.[41] "We do not see how the State can rely upon the theory of principals to sustain a conviction and deny that this appellant was entitled to a charge on self-defense under the theory of principals."[42]

Garcia is the lone case in this string that applied exactly what *Martinez* purports to stand for. This Court held that Garcia was entitled to an instruction on self-defense to murder despite consistently claiming she accidentally shot and killed her husband with a shotgun.[43] The jury was charged on accident, as her testimony

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[38] *Id*. Moreover, it appears from context the Court did not believe she was entitled to any self-defense instruction.

[39] 479 S.W.2d at 932.

[40] *Id*. at 931.

[41] *Id*. at 932.

[42] *Id*.

[43] 492 S.W.2d at 596.

suggested, but this Court said it should have been given the option to conclude she was defending herself against an unlawful attack.[44] *Garcia* relied on *Roberson* and *Merritt* on this point, although *Carden* was cited elsewhere.[45] As shown above, it should not have. The dissent made a point similar to the holding in *Sullivan*, *supra*: a defendant who testifies to his or her defensive theory should be bound thereby.[46]

In *Haliburton*, the defendant received a self-defense instruction following a *Juarez*-esque denial of intent, but the issue was admission of an extraneous shooting, not entitlement to the instruction.[47]

Sanders, *Martinez*'s primary source, is yet another sudden-passion manslaughter case. Sanders was indicted for murder but convicted of voluntary manslaughter.[48] Sanders claimed he was wrongfully denied a multiple-assailants instruction.[49] The State's response was that he was entitled to no self-defense

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[44] *Id*.

[45] *Id*. at 595-96.

[46] *Id*. at 596 (Morrison, J., dissenting) ("'Appellant, having testified, . . . made his own defensive theory and is bound thereby.'") (quoting *Rice v. State*, 242 S.W.2d 394, 395 (1951) (orig. op.) (alteration in *Garcia*).

[47] 528 S.W.2d at 217-18 (defendant denied intent to kill despite fearing for her life because he had a gun, but also said, "I was trying to stop him period. It was either him or me.").

[48] 632 S.W.2d at 346.

[49] *Id*. at 347.

instruction because he denied the intent to shoot anyone.[50] This Court disagreed, holding, "In a situation such as this, the shooting of the victim does not have to be intentional in order to warrant an instruction on self-defense."[51] *Sanders* relied on *Merritt* and *Sullivan*. As shown above, it should not have. Moreover, although the legal basis for the jury's conviction is unclear, the Court was technically correct in that neither voluntary nor involuntary manslaughter were statutorily exempted from justification under the 1974 Penal Code. Once again, this has been (re)affirmed in *Alonzo*. Nothing in *Sanders* says he would have been justified to commit an intentional murder despite his denial of intent.

II.C. These cases effectively say the opposite is true.

Read collectively, there is scant support in this line for the idea that a defendant is entitled to a self-defense instruction on intentional murder despite explicitly denying the intent to kill. What there is abundant support for is the idea that a defendant who says he perceived the threat of unlawful deadly force but "accidentally" killed the victim may be entitled to an instruction on manslaughter and a corresponding instruction on justification, as per *Alonzo*. But that's it.

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[50] *Id*. at 348.

[51] *Id*.

II.D. Nothing since *Martinez* justifies it.

Martinez has been cited in five cases from this Court.[52] As with nine of its precursors, none have applied the *dicta* for which *Martinez* is known.

Juarez held a defendant is entitled to a justification defense despite explicitly denying intent if his testimony otherwise plainly embraces his commission of the offense—both the act and mental state.[53] *Martinez* was mentioned only as an example of inconsistent application of the confession-and-avoidance doctrine.[54]

Cornet held that non-medical professionals can utilize the medical-care defense.[55] A plurality mentioned *Martinez* as an example of inconsistency.[56] But it declined to address whether denial precludes entitlement, instead holding in an "extremely close call" that Cornet "essentially admitted" penetration based on the nature of that term.[57]

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[52] Along with *Ebikam* and *Alonzo*, *supra*, it was cited in *Juarez v. State*, 308 S.W.3d 398 (Tex. Crim. App. 2010), *Cornet v. State*, 359 S.W.3d 217 (Tex. Crim. App. 2012) (plurality), and *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017).

[53] 308 S.W.3d at 405.

[54] *Id.* at 403.

[55] *Cornet*, 359 S.W.3d at 221-22.

[56] *Id*. at 225 n.43 (plurality) (noting that *Juarez* "treated *Martinez* as little more than a legal anomaly and pointed out that we have, since *Martinez*, re-emphasized the applicability of confession and avoidance to self-defense, at least as it relates to misdemeanor assault.") (citation omitted).

[57] *Id*. at 227-28.

As mentioned above, *Alonzo* held that self-defense applied to manslaughter. It cited *Martinez* in support of its observation that "[t]he Penal Code does not require that a defendant intend the death of an attacker in order to be justified in using deadly force in self-defense."[58] The citation is curious, because the plain language of Sections 9.31 and 9.32 answer that question.

Gamino was about a defendant's ability to admit to all the elements in *his* version of events—not denying or even omitting elements.[59] *Martinez* was cited as an example of how a defendant could somehow admit to the conduct without admitting every element, but it was unnecessary to *Gamino*'s holding and reasoning.

Ebikam extended *Gamino* to the manner and means of assault causing bodily injury.[60] It cited *Martinez* in its recap of justification law as an example of looking to "what the defensive evidence implied and not merely what it proclaimed."[61] It acknowledged the fact that Martinez was not entitled to self-defense for other reasons but buttressed its invocation with citation to *Sanders*.[62] Again, *Sanders* does not support the view that a defendant is entitled to self-defense to an intentional offense despite denying the intent. And *Ebikam*'s discussion was unnecessary to the holding.

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58 *Alonzo*, 353 S.W.3d at 783.

59 537 S.W.3d at 512.

60 2020 WL 3067581, at *4.

61 *Id*. at *2.

62 *Id*.

Each of these developments since *Martinez* make sense, including *Ebikam*—if it is interpreted correctly. None of them require adherence to *Martinez*'s *dicta*. It should be rejected.

III. This Court can settle this once and for all.

As the history of this anomaly makes clear, these is no reason this Court should feel bound by *Martinez*. It appears that only once in the last 120 years this Court approved of a self-defense instruction to murder despite an explicit claim of "accident." That was in 1973. On one other occasion, in 1911, it sanctioned a justification defense for an offense that is defined by the absence of justification. Across that same span, in contrast, this Court regularly espoused an idea comparable to what this Court held in *Alonzo*: a defendant who claims to have unintentionally killed someone while in fear for his life is entitled to a justification instruction applied to some lesser version of murder.

Moreover, this Court has repeatedly and plainly said a defendant must admit to *all* the elements to obtain a justification instruction.[63] Perhaps the intuitiveness of

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[63] *See*, *e.g.*, *Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999) ("To raise necessity, Appellant must admit he committed the offense and then offer necessity as a justification."); *Ex parte Nailor*, 149 S.W.3d 125, 134 (Tex. Crim. App. 2004) (appellant not entitled to self-defense because he "did not rely upon the law of self-defense at trial. Both trial counsel's argument and appellant's testimony centered on a lack of intent, *i.e.*, it was an accident."); *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) (confession and avoidance defenses appropriate only when defendant "essentially admits to every element of the offense *including* the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct.") (emphasis in original); *Juarez*, 308 S.W.3d at 399 ("[A] defendant must admit to the conduct—the act and the culpable mental state—of the charged offense to be entitled to a necessity instruction."); *Villa v. State*, 417 S.W.3d 455, 462 (continued...)

that rule explains why this is one of three defense petitions granted review on the insufficiency of admission.[64] Either way, there is no compelling reason not to overrule *Garcia*, disavow the *dicta* in *Martinez* that is periodically repeated but not applied, and bring simplicity back to this area of law.

III.A There are two simple options.

The first option is what Judge Yeary suggested in his dissent to *Ebikam*: give the instruction whenever the evidence could rationally support a finding that the defendant 1) is guilty, and 2) would have been justified under Chapter 9 of the Penal Code.[65] As Judge Yeary would ignore both lack of concession and even "steadfast denial,"[66] entitlement could be completely divorced from a defendant's subjective belief and intent, testimony, and even apparent strategy (prior to the charge conference).

The second option is to give instructions only on the justifications defendants present. It should not be difficult to make that determination in the bulk of cases; if

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[63](...continued)
(Tex. Crim. App. 2013) ("[A] defendant claiming entitlement to an instruction on the medical-care defense must admit to each element of the offense, including both the act and the requisite mental state.").

[64] The other two are *Maciel v. State*, PD-0752-20, and *Selectman v. State*, PD-0395-20.

[65] 2020 WL 3067581, at *7 (Yeary, J., dissenting).

[66] *Id*.

one has to ask whether a defendant presented a "yes, but" defense, the answer is probably "no." If a defendant tried, ham-handedly or otherwise, to explain why he did what the State accuses him of, the jury should decide if he was reasonable.

III.B. These options are not equal.

Both options are simple, but they are not equal. This case shows why. According to appellant, he 1) grabbed his gun because he was scared for himself and his brother, 2) pointed the gun at someone he believed posed a threat, and 3) had no intent to kill, but 4) the gun accidentally "went off," killing the victim.[67] Under Judge Yeary's test, appellant would be entitled to a justification defense to murder despite claiming no murder occurred. Under the second option, which follows the vast majority of law as it has existed for 120 years by looking at the defense appellant actually presented at trial, appellant denied the commission of murder but would be entitled to a manslaughter instruction that incorporates self-defense.[68] One model of entitlement follows appellant's defense. The other does not. No amount of other evidence should permit a rational jury to impute a justification a defendant failed to raise or, in this case, plainly rejected.

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[67] App. Br. at 6-9.

[68] *See Alonzo*, 353 S.W.3d at 784 (Keller, P.J., concurring) ("to the extent that the doctrine of self-defense defines when conduct is justified, its inclusion (when the issue is raised) is necessary to give the jury adequate information to determine whether a defendant did in fact disregard an 'unjustifiable' risk.").

IV. Conclusion

Appellant was not entitled to a self-defense instruction to murder because justification was not his defense to murder. As appellant argues to this Court, his testimony explained the context of an accidental killing.[69] In other words, he set out to justify a manslaughter. He was entitled to have the jury pass on that, but nothing more. And because the jury convicted him of murder, any error in the charge related to lesser offenses was harmless.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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[69] App. Br. at 10.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,953 words.

/s/ John R. Messinger
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of February, 2021, a true and correct copy of the State's Brief as Amicus Curiae has been eFiled or e-mailed to the following:

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/s/ John R. Messinger
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Stacey Soule on behalf of John Messinger
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Associated Case Party: Marvin Rodriguez

Name	BarNumber	Email	TimestampSubmitted	Status
Charles James Gibson	787533	jim@jimgibsonlaw.com	2/23/2021 4:26:52 PM	SENT

Associated Case Party: State of Texas

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Joseph Spence		ccaappellatealerts@tarrantcountytx.gov	2/23/2021 4:26:52 PM	SENT